No. 00-1742 (9)

IN THE SUPREME COURT OF THE UNITED STATES

ABU-ALI ABDUR'RAHMAN,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO STRIKE PORTIONS OF BRIEF *AMICI CURIAE* OF NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL ALLIANCE FOR THE MENTALLY ILL OF TENNESSEE, NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, TENNESSEE CHAPTER, AND TENNESSEE VOICES FOR CHILDREN, INC.

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App

Respondent respectfully moves the Court for an order striking from the Brief *Amici Curiae* of National Mental Health Association, et al., the appendix (pages 1a—8a) and the second full paragraph on page 11 of the brief. The appendix consists of the affidavits of eight jurors, impeaching their sentencing verdict at petitioner's 1987 trial. The second full paragraph on page 11 of the brief consists of argument based on the affidavits.

The affidavits are not part of the certified record in this case. Therefore, the affidavits and the argument based on them are not properly before this Court. *See Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851)("This court must affirm or reverse upon the case as it appears in the record"); *Hopt v. Utah*, 114 U.S. 488, 491-92 (1885)("The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record . . . and not by *ex parte* affidavits . . .").

Furthermore, Fed.R.Evid. 606(b)[1] prohibits such affidavits from being received

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[1]Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

for the purpose of demonstrating "the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. . . ." This rule prohibits juror testimony about whether the sentence would have been different had the jury heard mitigating evidence that was allegedly available but not presented at trial. *Williams v. Collins*, 16 F.3d 626, 636 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994). *See* 27 C. Wright & V. Gold, *Federal Practice and Procedure* § 6074, p. 416 (Supp. 2001)("The rule also prohibits jurors from testifying as to how evidence that was not received might have influenced their verdict").

For the reasons stated, the Court should enter an order striking the above-designated portions of the brief.

Respectfully submitted,

PAUL G. SUMMERS
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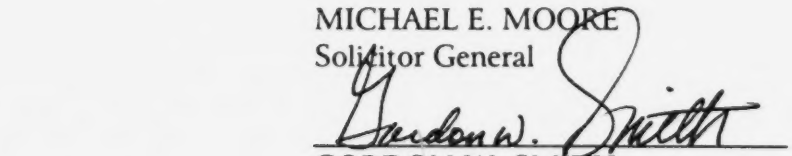

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CERTIFICATE OF SERVICE

I, Gordon W. Smith, a member of the Bar of this Court, hereby certify that on the 19th day of July, 2001, one copy of this motion was mailed, first-class, postage prepaid, to each of the following:

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I further certify that all parties required to be served have been served.

Gordon W. Smith

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